Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

DORIS DAY ANIMAL LEAGUE, MEDINA COUNTY SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, VALLEY RIVER HUMANE SOCIETY, BOB BAKER, PUG HAVEN RESCUE FOUNDATION, DON CURRY,
Petitioners,

v.

ANN VENEMAN, Secretary
United States Department of Agriculture,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Department of Agriculture's regulatory definition of "retail pet store" is overly broad in violation of the Animal Welfare Act, 7 U.S.C. §§ 2131-2159 and Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq*.

PARTIES TO THE PROCEEDING

The parties to this proceeding are as follows:

Petitioners: Doris Day Animal League, Medina County Society for the Prevention of Cruelty to Animals, Valley River Humane Society, Bob Baker, Pug Haven Rescue Foundation, and Don Curry appeared as plaintiffs in the U.S. District Court for the District of Columbia and appellees in the U.S. Court of Appeals for the D.C. Circuit. Petitioners are nonprofit organizations or individuals concerned about the humane treatment of animals intended for use as pets. No petitioner has a parent or publicly held company owning 10% or more of the corporation's stock.

Respondent: Daniel Glickman, in his official capacity as Secretary, United States Department of Agriculture; his successor, Ann Veneman, in her official capacity as Secretary, United States Department of Agriculture; Craig Reed, in his official capacity as Administrator, Animal Plant Health and Inspection Service, United States Department of Agriculture; his successor, Bobby Accord, in his official capacity as Administrator, Animal Plant Health and Inspection Service, United States Department of Agriculture, appeared as defendants in the U.S. District Court for the District of Columbia and appellants in the U.S. Court of Appeals for the D.C. Circuit.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
RELEVANT STATUTES AND REGULATION	2
STATEMENT OF THE CASE	2
A. Basis Of Jurisdiction In Lower Courts	2
B. USDA's Failure To Properly Enforce The Animal Welfare Act	2
C. Background Of Case	5
D. Judicial Opinions	6
REASONS FOR GRANTING THE WRIT	8
THE COURT OF APPEALS DECISION ARBITRARILY NULLIFIES SIGNIFICANT PORTIONS OF THE ANIMAL WELFARE ACT AND CREATES NEW AND DANGEROUS JUDICIAL REVIEW STANDARDS THAT VIOLATE LONG STANDING SUPREME COURT PRECEDENT	8
A. The Court Of Appeal's Opinion Effectively Nullifies The Animal Welfare Act's Protections For Any Pets Sold In Retail	10
B. The Court of Appeals Erroneously Ignored The Language Congress Used In The Animal Welfare Act And Instead Looked At Whether USDA's Regulatory Definition Is "Possible"	12

TABLE OF CONTENTS—Continued

Page

1. The court of appeals failed to review the term "retail pet store" within the context of the Animal Welfare Act 13

2. The court of appeals failed to examine the Animal Welfare Act's statutory purpose 15

C. The Court Of Appeal's Opinion Conflicts With The Supreme Court's Well-Established Precedent For Determining Whether An Agency Acted Reasonably In Construing Statutory Terms 17

1. The court of appeals failed to review the ordinary and fair meaning of "retail pet store" 18

2. The decision by the court of appeals may subject homeowners to invasion of privacy and new state and local regulations 20

CONCLUSION 22

Appendix A—Opinion of the U.S. District Court for the District of Columbia, Decided July 30, 2001 ..... 1a

Appendix B—Opinion of the U.S. Court of Appeals for the District of Columbia Circuit, Decided January 14, 2003 ..... 23a

Appendix C—Order of the U.S. Court of Appeals for the District of Columbia Circuit, *En Banc,* Decided March 14, 2003 ..... 32a

Appendix D—Animal Welfare Act,

7 U.S.C. § 2132 ..... 33a

7 U.S.C. § 2133 ..... 37a

TABLE OF CONTENTS—Continued

	Page
Appendix E—Animal Welfare Regulations 9 C.F.R. § 1.1	38a
Appendix F—First Amended Complaint, Filed July 6, 2000	53a
Appendix G—Declaration of Kathy Wilkes-Myers, Executed on March 5, 2001	81a
Appendix H—Declaration of Don Curry, Executed on March 6, 2001	89a
Appendix I—Declaration of Holly Hazard, Executed on March 6, 2001	93a
Appendix J—Declaration of Jeff Holland, Executed on March 6, 2001	98a
Appendix K—Declaration of Bob Baker, Executed on March 7, 2001	101a
Appendix L—Declaration of Paul Poore, Executed on March 7, 2001	104a
Appendix M—Declaration of Jeff Lockett, Executed on March 21, 2001	109a
Appendix N—Plaintiffs' Exhibit No. 1, Administrative Record p. S2-00000003	113a

TABLE OF AUTHORITIES

CASES Page

Andrus v. Glover Constr. Co., 446 U.S. 608 (1980) 14
AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366 (1999) ..... *passim*
Bd. of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361 (1986) 12-13
Brown v. Gardner, 513 U.S. 115 (1994) 12, 14
Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) ..... *passim*
Comm'r v. Clark, 489 U.S. 726 (1989) 14
Dole v. United Steelworkers of America, 494 U.S. 26 (1990) 12, 15
Doris Day Animal League v. Veneman, 2001 U.S. Dist. LEXIS 23439 (D.D.C. 2001), *rev'd*, 315 F.3d 297 (D.C. Cir 2003), *reh'g denied en banc*, 2003 U.S. App. LEXIS 4823 (D.C. Cir. 2003) ..... *passim*
FDA v. Brown & Williamson Tobacco, 529 U.S. 120 (2000) 13
Fed. Election Comm'n v. Democratic Senatorial Campaign Comm., 454 U.S. 27 (1981) 16
Halverson v. Slater, 129 F.3d 180 (D.C. Cir. 1997) 15
Massachusetts v. Morash, 490 U.S. 107 (1989) 15
McNary v. Haitian Refugee Ctr., Inc. 498 U.S. 479 (1991) 15
Pennsylvania Dep't of Pub. Welfare v. Davenport, 495 U.S. 552 (1990) 14
Russello v. United States, 464 U.S. 16 (1983) 15
Schreiber v. Burlington Northern, Inc., 472 U.S. 1 (1985) 12

TABLE OF AUTHORITIES—Continued

STATUTES, REGULATIONS, AND FEDERAL REGISTERS	Page
Administrative Procedure Act,	
5 U.S.C. §§ 551 *et seq*	i
5 U.S.C. § 553(e)	5
Animal Welfare Act,	
7 U.S.C. §§ 2131-2159	i
7 U.S.C. § 2131(b)(1), (3)	10, 16
7 U.S.C. § 2132(a), (f)	*passim*
7 U.S.C. § 2133	2, 15
7 U.S.C. § 2146(c)	2
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1291	2
28 U.S.C. § 1331	2
28 U.S.C. § 1346	2
28 U.S.C. § 1361	2
USDA Animal Welfare Regulations,	
9 C.F.R. § 1.1	2, 4
7 C.F.R. § 1.28	5
62 Fed. Reg. 14,044 (1997)	6
64 Fed. Reg. 38,546 (1999)	4, 6
65 Fed. Reg. 75,635 (2000)	6
68 Fed. Reg. 12,283 (2003)	6
LEGISLATIVE HISTORY	
H.R. Rep. No. 91-1651 (1970), *reprinted in*, 1970 U.S.C.C.A.N. 5103	3, 16, 19
Pub. L. No. 89-544, 80 Stat. 359 (1966)	3
Pub. L. No. 91-579, 84 Stat. 1560 (1970)	3, 10
MISCELLANEOUS	
Webster's Third International Dictionary	18

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Petition for a Writ of Certiorari to review the judgment of the U.S. Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. District Court for the District of Columbia in *Doris Day Animal League v. Veneman* is reported at 2001 U.S. Dist. LEXIS 23439 (D.D.C. 2001) and is reprinted in the Appendix at 1a (hereinafter "Pet. App."). The opinion of the U.S. Court of Appeals for the District of Columbia Circuit is reported at 315 F.3d 297 (D.C. Cir. 2003)

and in Pet. App. at 23a. The denial of the petition for rehearing en banc is reported at 2003 U.S. App. LEXIS 4823 (D.C. Cir. 2003) and in Pet. App. at 32a.

STATEMENT OF JURISDICTION

The judgment of the U.S. Court of Appeals for the District of Columbia Circuit was filed on January 14, 2003. 315 F.3d 297 (D.C. Cir. 2003), Pet App. at 23a. The Court of Appeals order denying petitioners' request for rehearing en banc was filed on March 14, 2003. Pet App. at 32a. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

The following statutes and regulations are set forth in the appendix:

The Animal Welfare Act, 7 U.S.C. §§ 2132, 2133 (2000) (Pet. App. at 33a, 37a).

USDA Animal Welfare Regulations, 9 C.F.R. § 1.1 (2003) (Pet. App. at 38a).

STATEMENT OF THE CASE

A. Basis Of Jurisdiction In Lower Courts

The U.S. District Court for the District of Columbia had jurisdiction over Doris Day Animal League's *et al* amended complaint under 7 U.S.C. § 2146(c) (jurisdiction of U.S. district courts) and 28 U.S.C. §§ 1331 (federal question), 1346 (U.S. defendant), 1361 (mandamus). The U.S. Court of Appeals for the District of Columbia Circuit had jurisdiction over United States Department of Agriculture's appeal under 28 U.S.C. § 1291 (final decision of district courts).

B. USDA's Failure To Properly Enforce The Animal Welfare Act

Throughout the country thousands of dogs and puppies are being subject to extremely inhumane and abusive conditions

at numerous commercial dog-breeding facilities. This widespread, and often shockingly, inhumane treatment of dogs and puppies has been widely reported in both the electronic and print media over a period of many years. The facilities of these inhumane dealers of dogs are commonly referred to as "puppy mills." Puppy mills continuously breed female dogs when they are in heat and then house these female dogs and their puppies in deplorable conditions. These puppy mills continue to proliferate and profit and regularly advertise both in newspapers and over the internet.

The Animal Welfare Act ("AWA") was specifically intended and designed to prevent this and other inhumane treatment of animals. In 1966, Congress first enacted the Federal Laboratory Animal Welfare Act to address the abuses that developed as a result of the nation's vast program of medical research, particularly research involving experimentation with animals. Pub. L. No. 89-544, 80 Stat. 359 (1966). In 1970, Congress passed the Animal Welfare Act of 1970, which expanded the coverage of the statute to include dealers of animals sold for use as pets. Pub. L. No. 91-579, 84 Stat. 1560 (1970). The 1970 amendments "established by law the humane ethic that animals should be accorded basic creature comforts of adequate housing, ample food and water, reasonable handling, decent sanitation, and sufficient ventilation." H.R. Rep. No. 91-1651 (1970), *reprinted in*, 1970 U.S.C.C.A.N. 5103, 5104.

As a result of the amendments made in 1970 and subsequent amendments made in 1976, the AWA now requires animal dealers to be licensed and to comply with the record keeping and humane handling, care, treatment, and transportation regulations established by USDA. Under the AWA, Congress intended anyone who sells animals for profit to comply with the provisions of the Act. 7 U.S.C. § 2132(f). There are only two limited exceptions to this broad statutory requirement. The first exemption is for a "retail pet store" and

the second exemption is for "any person" who sells animals, except wild animals, dogs, and cats, for less than five hundred dollars a year. *Id.*

Unfortunately, the United States Department of Agriculture ("USDA") defines a "retail pet store" in its regulations, beyond the plain and reasonable meaning of the term by extending the term to mean *"any outlet"* (barn, basement or backyard) where animals are sold at retail for use as pets. 9 C.F.R. § 1.1. Consequently, the "retail pet store" exemption extends to people who sells retail, no matter if they are selling animals from pet stores or their own residence. 64 Fed. Reg. 38,546, 38,547 (1999). As noted below, the dire result of USDA's overly broad exclusion is that a growing number of retail dealers, known as puppy mills, are selling and breeding animals, primarily dogs, on their own premises, and are profiting from raising animals in inhumane and unsanitary conditions. The court of appeals decision reversing the district court and upholding this unlawful regulation exempting all retail dealers from AWA humane care and treatment requirements, allows for the continuation of terrible suffering for thousands of puppies and dogs. Additionally, it nullifies any AWA protection for any animal sold retail.

Moreover, by upholding the USDA equation of the definition of a "retail pet store" with that of a "home," the court of appeals allows for an exponential increase in an agency's power to ignore the common and fair meaning of statutory words and instead to substitute illogical interpretations that may fit the agency's needs but thwart congressional intent. Finally, the precedent of arbitrarily equating "retail stores" with "homes" under the AWA could be expanded in a manner that would mean hardship and invasion of privacy for hundreds of thousands of individuals who sell items from their homes and could now find themselves potentially subject to licensing, zoning, sanitation and myriad other regulations.

C. Background Of Case

On June 22, 1995, pursuant to USDA's regulations, 7 C.F.R. § 1.28, and § 553 (e) of the Administrative Procedure Act, petitioner Doris Day Animal League ("DDAL") filed a petition for rulemaking with USDA notifying them that the agency was illegally exempting thousands of animals from the regulatory protections of the AWA. The petition explained that the agency's regulatory definition of "retail pet store" as any "outlet" was overly broad and contrary to the intent of Congress and language of the AWA. Pls. First Am. Compl. ¶ 57, Pet. App. at 70a.[1] To remedy this violation, petitioners requested that USDA narrow the definition of "retail pet store" to include only non-residential business establishments. *Id.*

After receiving no response from the agency regarding the petition, petitioner sent two letters requesting a response and threatening to seek judicial review if the agency did not respond. *Id.* ¶¶ 59-60, Pet. App at 71a. The agency failed to respond to petitioner's letters and provided no substantive response to the petition. Subsequently, petitioner sued for unreasonable delay and for violations of the AWA in U.S. District Court for the District of Columbia ~~on December~~ 19, 1996. *Id.* ¶ 61, Pet. App. at 71a. Later, the case was resolved after both parties agreed to a settlement and filed a Stipulation of Dismissal on March 12, 1997, whereby USDA agreed to consider the regulatory changes proposed in the petition. *Id.* ¶ 62, Pet. App. at 71a. On March 25, 1997, USDA published the petition in the Federal Register and requested comments.

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[1] Additionally, the petition notified USDA that its stated policy of exempting hunting, security, and breeding dog dealers from the protections in the agency's animal welfare regulations was contrary to the language and Congressional intent of the AWA. *Id.* Petitioners requested that USDA rescind the policy excluding all hunting, breeding, and security dog dealers from complying with USDA's regulations. *Id.*

62 Fed. Reg. 14,044 (1997). A total of 36,000 comments were received by the agency. Pls. First Am. Compl. ¶ 63, Pet. App. at 71a.

Finally, on July 19, 1999, four years after petitioner DDAL filed the petition, USDA issued a decision and policy statement in the Federal Register. 64 Fed. Reg. 38,546 (1999). Instead of granting the petition and conforming its regulations to the plain meaning of the AWA and the intent of Congress, USDA decided *not* to narrow the definition of "retail pet store." *Id.* [2]

D. Judicial Opinions

This is a dispute over USDA's exemption of thousands of animals from the regulatory protections of the AWA. Due to USDA's overly broad regulatory definition of "retail pet store," petitioners sued USDA in the U.S. District Court for the District of Columbia. The district court was guided by *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and reviewed the scope of the "retail pet store" exemption by examining the language and structure of the AWA. 2001 U.S. Dist. LEXIS 23439, *15-29 (2001), Pet. App. at 9a-17a. In applying the first step of *Chevron*, the court used the traditional tools of statutory construction, including examination of the statute's text, structure, legislative history, and purpose to determine the plain meaning of the Act. *Id.*

The district court found that the meaning of "retail pet store" is clear and "does not include persons who raise dogs

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[2] USDA decided to modify its policy and regulations by requiring the regulation of only wholesale dealers of hunting, breeding, and security dogs. On December 4, 2000, defendants issued a proposed rule to license only wholesale dealers of hunting, breeding, and security dogs, retailers were exempt. 65 Fed. Reg. 75,635 (2000). The district court stated that it lacked jurisdiction to review this claim because the proposed rule was not yet final. USDA finalized this rule on March 14, 2003. 68 Fed. Reg. 12,283 (2003)

and cats on their own premises for sale as pets." *Id.* at *18, Pet. App. at 11a. The court explained that "Congress made a conscious choice to use certain words and to discount others. Further, Congress intentionally chose the structure of the provision." *Id.* The district court noted that Congress carefully tailored the dealer and licensing provisions and accordingly held that it was inconsistent with the plain meaning of the AWA to squeeze residential retail dealers under the "retail pet store" exemption. *Id.* at *21, Pet. App. at 12a-13a. Based upon the text, structure, legislative history, and purpose of the AWA, the court concluded that defendants' regulatory definition of "retail pet store" was contrary to the plain meaning of the statute, overly broad and not entitled to deference. *Id.* at *28, Pet. App. at 17a. The court ruled for petitioners and USDA appealed.

The U.S. Court of Appeals for the District of Columbia Circuit reversed the lower court's decision. 315 F.3d 297 (D.C. Cir. 2003), Pet. App. at 23a. The court of appeals then conducted a cursory review of the meaning of the term within the statute as part of a truncated and misconstrued *Chevron* analysis. The court of appeals did not consider whether the agency's interpretation of the term "retail pet store" comported with the "ordinary and fair" definition of the term. Ultimately, the court of appeals found the USDA's regulatory definition a "permissible construction" of the AWA. *Id.* at 301, Pet. App. at 31a. On March 14, 2002, the court of appeals denied petitioners' petition for rehearing en banc. 2003 U.S. App. LEXIS 4823, Pet. App. at 32a.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS DECISION ARBITRARILY NULLIFIES SIGNIFICANT PORTIONS OF THE ANIMAL WELFARE ACT AND CREATES NEW AND DANGEROUS JUDICIAL REVIEW STANDARDS THAT VIOLATE LONG STANDING SUPREME COURT PRECEDENT

The court of appeals decision upholding the expansion of the definition of "retail pet store" to include any and all retail dealers of animals has the breathtaking impact of nullifying all AWA protection of all pets sold for retail in the United States. Once all pet retailers are pushed into the "retail pet store" exemption there are no sellers of pets remaining to be regulated. This unprecedented agency amputation of the AWA thwarts both the goals and the provision of the statute. The court of appeals never recognized the scope and impact of its decision—never discussed that it was not only leaving puppy mills unregulated, but also all retail pet dealers. Clearly, this is an urgent issue for the Supreme Court to address.

Additionally, the court of appeals opinion is in direct conflict with the longstanding Supreme Court precedent for reviewing the plain meaning of statutory terms. *See Chevron*, 467 U.S. 837. Rather than thoroughly examining the language of the AWA, the court of appeals analysis focused on whether USDA's regulatory definition is "possible." This faulty analysis squarely conflicts with the Supreme Court's long line of statutory construction cases requiring review of the statute's express language. Most pointedly, if Congress intended to exempt all retail dealers of pets from the AWA's requirements, why did Congress instead, carve out a narrow exemption only for "retail pets stores" and provide several other provisions which specifically regulate other retail pet dealers?

Next, the court of appeals created a new and unfortunate precedent in its misguided understanding of the second step in the *Chevron* analysis. By solely relying on a review of the "reasonableness" of the agency's policy justifications for its action, the court of appeals failed to examine the fair and ordinary meaning of the term "retail pet store." *See AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 389-90 (1999). By ignoring this rule of statutory construction, the court of appeals failed to comport its review with longstanding Supreme Court precedent. This new and dangerous precedent involving the jettisoning of the "ordinary and fair" standard will result, as in this case, in massively expanding an agency's power to thwart the intent of Congress based upon the agency own policy decisions.

As a result of the court of appeals failure to accord the term "retail pet store" its fair and ordinary meaning, this decision could have the unintended effect of significantly disrupting current zoning, commercial and contract law. In the current case, making the terms "home" or "residence" synonymous with "retail store" allowed certain homeowners (namely those selling pets for retail) to escape regulation under the AWA. However, in the future, this illogical equating of "homes" with commercial businesses could have the opposite effect. If defining "homes" (from which items are sold) as "retail stores" were to become precedent, this could mean that everything from a garage sale to the sale of Girl Scout cookies from a home could transform such a home into a commercial business. Thereby, millions of homes might suddenly find themselves in violation of zoning regulations, sanitary and other commercial codes, local, state, and federal licensing provisions and any number of other regulations and laws. This would cause extraordinary hardship and invasion of privacy for homeowners and would create large-scale mischief and confusion in numerous areas of law.

A. The Panel Opinion Effectively Nullifies The Animal Welfare Act's Protections for Any Pets Sold In Retail

Congress passed the Animal Welfare Act of 1970 with the specific intent of expanding the coverage of the animal welfare statute to include retail and wholesale dealers of animals sold for use as pets. Pub. L. No. 91-579, 84 Stat. 1560 (1970). The 1970 amendments state that "Congress further finds it *essential* to regulate . . . the sale, housing care, handling and treatment of animals . . . by persons holding them for sale as pets . . ." 7 U.S.C. § 2131(b)(3) (emphasis added). Congress clearly mandates that whether the pet is sold in retail or wholesale it is entitled to protection under the AWA.

To ensure that the aims of the AWA were carried out Congress provided that anyone who sells animals for profit, whether as an individual or as a store, is required to be licensed and comply with the AWA humane care and treatment requirements. *Id.* at § 2132(f). Only two exceptions are provided for this broad statutory requirement. The first exemption is for "retail pet stores" that sell animals as pets and the second exemption is for "any person"[3] who sells animals, except wild animals, dogs, and cats, for less than five hundred dollars a year. *Id.*

As described *supra,* the USDA has illegally expanded the retail pet store exemption so that all "persons" or individuals who sell animals as pets, including those sold from private residences, are now exempt from the AWA. Accordingly, any individual or "person" selling pets is automatically and illogically transformed into a "retail pet store." This means that, *inter alia,* all private residential sales of dogs, termed

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[3] A "person" is defined under the AWA as including "any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity." Id. § 2132(a).

"puppy mills," are currently exempt from AWA coverage. As a result, each year untold thousand of puppies and dogs are subject to cruel and inhumane treatment. *See* Baker Decl. ¶ 3, Pet. App. at 101a-102a (observing terrible conditions at puppy mills, including "lack of veterinary care, lack of socialization, lack of nutrition, and lack of disease control. Animals are repeatedly housed in overcrowded cages that provide insufficient shelter from the elements. Lack of food and water is a very large problem.").

Due to these inhumane living conditions, many puppies sold from puppy mills suffer physical ailments and may also be aggressive or fearful of people or other animals. *See* Wilkes-Myers Decl. ¶ 26, Pet. App. at 86a (explaining that "some of the dogs suffered such severe abuse and neglect [at the puppy mill] that they will not make good pets. For example, some of the dogs shutter and shake, bite people out of fear, and defecate on themselves. Some of the dogs that were repeatedly bred have never walked on the ground. They have been in cages their whole life so they have terrible arthritis."). Repeatedly, people go out to buy that perfect puppy as a pet from these retail puppy mill dealers, who breed dogs on their own premises, only to find that the puppy they purchased is sick. *See* Curry Decl. ¶ 2, Pet. App. at 89a (responding to a newspaper advertisement, petitioner purchased a Pekingese puppy from a newspaper advertisement. He expected a healthy dog but did not even get home before the puppy became ill. He "took the dog to the veterinarian who said that the dog has intestinal problem from living in filthy conditions.").

Importantly, the USDA expansion of the narrow "retail pet store" exemption, not only exempts puppy mills from coverage, but also grants all individuals who sell pets retail an exemption from the AWA. The court of appeals decision supporting this agency action therefore, *sub silentio*, nullifies all the relevant provisions of the AWA designed to protect

pets sold in retail. This amounts to a nullification of many of the most significant provisions of the 1970 amendments to the AWA through an unprecedented gutting of an act of Congress by a regulatory agency. A court of appeals decision with little analysis, strips statutory protections from cruelty to the thousands of puppies and dogs in puppy mills, and more broadly from all animals sold in retail in the United States. Therefore, it warrants review by the Supreme Court.

B. The Court Of Appeals Erroneously Ignored The Language Congress Used In The Animal Welfare Act And Instead Looked At Whether USDA's Regulatory Definition Is "Possible."

In an attempt to rewrite *Chevron*, the court of appeals looked at dictionary definitions to review the plain meaning of "retail pet store" in the AWA. *See* 315 F.3d at 298. This is inconsistent with the long line of Supreme Court precedent stating that a plain meaning search starts with the express language of the statute. *See Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1990) (explaining that when construing a statute, the "starting point is the language of the statute.") citing *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 5 (1985). This Court has explained that "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Altering the standards of statutory construction that this Court has consistently set-forth, the court of appeals appears to focus on whether USDA's definition is "possible," rather than thoroughly reviewing the express language of the AWA. This abbreviated and deferential approach to reviewing the plain meaning of a statute conflicts with the Supreme Court's well-established case law and should not be allowed to stand as a new precedent for statutory construction. *See Board of Governors of the Fed. Reserve Sys.*, 474 U.S. at 368 (explain-

ing that the "traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress.").[4]

1. *The court of appeals failed to review the term "retail pet store" within the context of the Animal Welfare Act*

The court of appeals deviated from Supreme Court precedent by failing to conduct a thorough analysis of the meaning of "retail pet store" within the context of the statute. This Court has explained that the words of a statute may only become evident when read in the context of the statute. *FDA v. Brown & Williamson Tobacco*, 529 U.S. 120, 132-33 (2000). In reviewing the meaning of "retail pet store" within the dealer and licensing provisions of the AWA, it is evident that Congress did not intend to exempt from regulation individuals who sell dogs and cats retail from their own premises as pets. If the court of appeals had conformed to the accepted standard of review of these provisions, then the court would have noticed that Congress intentionally chose to use certain words and not others in order to ensure a narrow construction of the AWA's "retail pet store" exemption.

In the AWA, Congress provides that a "dealer" is "any person" who for profit buys or sells animals to be used as pets.[5] 7 U.S.C. § 2132(f). A "person" is defined under the AWA to include "any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity." *Id.* § 2132(a). This broad definition demonstrates that Congress intended to include anyone who sells

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[4] The court of appeals even brushed passed the standard for reviewing an agency's interpretation of a statute. *See* 315 F.3d at 298, Pet. App. at 25a (stating that there "is no need to repeat the standards for reviewing an agency's interpretation of a statute it alone administers").

[5] A dealer also includes any person who buys or sells animals for profit to be used in research, teaching, or exhibition. 7 U.S.C. § 2132(f).

animals under the definition of "dealer." Congress identified only two limited exceptions to this broad statutory mandate by excluding: (1) a "*retail pet store* except such store which sells any animals to a research facility, an exhibitor, or a dealer" or (2) "*any person* who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat and who derives no more than $500 gross income from the sale of other animals during any calendar year." *Id.* § 2132(f)(i), (ii) (emphasis added). In light of the structure of the statute, these two exemptions should have been construed narrowly. *See e.g., Comm'r v. Clark*, 489 U.S. 726, 739 (1989) (explaining that statutory exceptions are to be construed "narrowly in order to preserve the primary operation of the provision); *see also Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) (explaining that when Congress enumerates exceptions, "additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").

In failing to conduct a thorough contextual review of the language and structure of the AWA, the court of appeals virtually ignored the words carefully chosen by Congress. *See Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 557-58 (1990) (explaining that "statutory interpretation begins with the language of the statute itself"). This is a significant error. A contextual review clearly reveals that Congress intentionally limited the scope of the "retail pet store" exemption. Congress could have phrased the first exemption to include both individuals selling from their residences and retail stores by stating that *any* "dealer" (or "person") who sells pets retail is excluded from AWA requirements. Congress did not do so. Instead, Congress limited the exemption from AWA requirements to only one class of "dealers" (or "persons"), namely "retail pet stores." Thus, Congress intentionally limited the scope of the retail pet store exemption. *See Brown*, 513 U.S. at 120 (stating that "where Congress includes particular language in one section

of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") citing *Russello v. United States*, 464 U.S. 16, 23 (1983).

To ignore the distinction between "retail pet store" and all other retail pet "dealers" the court of appeals is disregarding the premise that "Congress cannot be presumed to do a futile thing." *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997). Moreover, this Court has explained that it is presumed that "Congress legislates with knowledge of our basic rules of statutory construction." *McNary v. Haitian Refugee Ctr., Inc.* 498 U.S. 479, 496 (1991). Rather than review the distinction between "retail pet store" and other "dealers" within the context of the AWA, the court of appeals chose to ignore the intentional language chosen by Congress and defer to USDA's interpretation.[6] In essence the court of appeals rewrote the AWA to exclude *all* retail pet dealers from AWA requirements instead of only one subset of dealers—retail pet stores.

2. *The court of appeals failed to examine the Animal Welfare Act's statutory purpose*

This Court has explained that in "expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Dole*, 494 U.S. at 35 (citing *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989)). In reviewing the plain meaning of "retail pet store" the court of appeals failed to adhere to this principle of judicial review. If the court of

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[6] In the licensing provision, Congress also took care to distinguish between a "retail pet store" and "other persons" who sell animals from their own premises. *See* 7 U.S.C. § 2133. As with the dealer provision, the court of appeals ignored the distinction between these terms and Congress' intention to not include individuals who sell dogs and cats from their own premises under the "retail pet store" exemption.

appeals had looked at the purpose of the AWA when reviewing the plain meaning of "retail pet store," then the court would have realized that excluding all animals sold retail from AWA protection is inconsistent with the AWA's purpose.

Defining "retail pet store" so as to exclude from AWA coverage all retail dealers, including those who sell animals from their own residence, is patently inconsistent with the AWA's broad purpose of insuring that animals intended for use as pets are provided humane care and treatment. 7 U.S.C. § 2131(b)(1). The legislative intent of the 1970 amendments was to expand "the perimeters of its protection to more animals and to more people who handle, exhibit, buy or sell, or transport them or who use them in the pursuit of medical and scientific knowledge." H.R. Rep. No. 91-1651, *reprinted in* 1970 U.S.C.C.A.N. 5103, 5104. USDA's regulatory exclusion of all retailers severely restricts and frustrates the broad protection Congress provided for animals intended as pets. *See Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981) (explaining that courts must reject administrative constructions of a statute that "are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.").

The court of appeal's decision failed to acknowledge the fundamental purpose of the 1970 AWA amendments. Instead, the court eliminated all retailers, a whole class of those intended to be regulated, from coverage under this act. This extraordinary thwarting of the stated purpose of the AWA runs directly counter to this Court's precedents and the clear intent of Congress.

C. The Court Of Appeals Opinion Conflicts With The Supreme Court's Well-Established Precedent For Determining Whether An Agency Acted Reasonably In Construing Statutory Terms.

The court of appeals opinion also directly conflicts with the Supreme Court's past rulings holding that an agency's interpretation of words within a statute must clearly comport with the "ordinary and fair" meaning of the term involved. *See AT&T Corp.*, 525 U.S. at 389-90. The court of appeals completely failed to apply this "ordinary and fair" test when reviewing whether USDA's definition of "retail pet store" is a reasonable interpretation under the AWA. Instead, as explained above, the panel used a test based on whether the agency definition of "retail pet store" is "possible." *See* 315 F.3d at 298, Pet. App. at 25a. The question of whether an agency interpretation of a key word in a statute should be its "ordinary and fair" meaning or merely a "possible" meaning represents a question of critical importance for curbing inappropriate agency power and for judicial review of agency action. If agencies are freed by the courts to use any "possible" meaning of statutory words when creating regulations, they will often be able, as in this case, to take *ultra vires* actions under the guise of obscure and illogical definitions of commonly understood terms.

Moreover, as a result of the court of appeals failure to accord the term "retail pet store" its fair and ordinary meaning, this decision could have the unintended effect of equating anyone who sells items retail from their own private home as a retail store, thereby causing substantial hardship and invasion of privacy for thousands of individuals who sell items from their homes.

1. *The court of appeals failed to review the ordinary and fair meaning of "retail pet store."*

By extending the definition of "retail pet store" to include any and all private sellers of pets, including those selling from their homes, the court of appeals repudiated a fundamental rule of judicial review of agency action, namely that such agency action cannot be upheld if the agency has departed from a realistic interpretation of the statute or its words. The Supreme Court has long held that regulations must be based on and consistent with the ordinary and fair meaning of a term or word. *See AT&T Corp.*, 525 U.S. at 389-90. Despite this rule of statutory construction, the court of appeals never even considered whether defining a private home as a "retail pet store" is the ordinary and fair meaning of the term "retail pet store." Instead of using this canon of judicial review, the court of appeal's opinion, citing selected dictionary definitions, states only that such a definition of "retail pet store" may be "possible." 315 F.3d at 298, Pet. App. at 25a.

Equating a "retail pet store" with a home or residence does not comport with the "ordinary or fair" meaning of either term. No one equates a "retail pet store" with a private home or barn. People do not say they are "going to buy something at the store" when they are going to buy something in someone's basement or garage. More specifically, the common understanding and dictionary definition of a home is a "private dwelling." Webster's Third International Dictionary, at 1082. "Private" is further defined as "restricted . . . not freely available to the public." *Id.* at 1804. The common definition of a store is a "commercial business establishment where goods are kept for retail sale." *Id.* at 2282. Retail stores are by necessity public and open to consumers. Private homes are not. This dichotomy explains why Congress exempted "retail pet stores" from the AWA. Retail stores are

scrutinized by the public and subject to commercial rules on sanitation, health codes, etc. Congress did not exempt private sellers of dogs and cats from AWA requirements because their homes and barns are not open to public scrutiny nor subject to commercial rules and regulations.

Even the USDA recognized that its definition of "retail pet stores" was not the common and ordinary meaning of the term. When denying petitioners' petition, USDA admitted that their regulatory interpretation of "retail pet store" includes "a very large number of facilities that are *not traditional pet stores*." Pet. App. at 114a (emphasis added). This admission was ignored by the court of appeals. Rather than limit the term "retail pet store" to a traditional store, USDA expands the meaning of this term to anyone who sells retail. The reasoning for this broad expansion is based upon policy arguments rather than the fair and ordinary meaning of the term. *See* 315 F.3d at 301, Pet. App. at 29a-31a. The court of appeals new statutory construction standard focuses *only* on USDA's policy considerations, instead of the fair and ordinary meaning of the term.

Courts should not be permitted to give agency's unlimited discretion in interpreting ambiguous terms. *Chevron* deference does not extend that far. This Court has explained that there needs to be a limiting standard in construing statutory terms that is "rationally related to the goals of the Act." *AT&T Corp.*, 525 U.S. at 388. There is no limiting standard within USDA's definition of "retail pet store," and therefore, everyone who sells retail is excluded from the AWA. This overly broad definition of "retail pet store" is inconsistent with the goals of the AWA—providing protection to more animals and regulating more people who sell animals intended to be used as pets. *See* H.R. Rep. No. 91-1651, *reprinted in* 1970 U.S.C.C.A.N. 5103, 5104. The court of appeals ignored the ordinary and fair meaning of the term "retail pet store" and instead, deferred to the agency. This

new standard for construing statutory terms is contrary to the Supreme Court's precedent, and consequently, should not be allowed to stand as precedent for how to construe statutory terms.

The failure of the court of appeals to utilize the appropriate "ordinary and fair" test on the USDA definition of "retail pet store" has significant implications beyond the facts in this case. Permitting a regulatory agency to arbitrarily jettison the "ordinary and fair" meaning of a term, and instead foray into the land of any "possible" meaning of a statutory term to further the agency's policy choices, would grant extra-ordinary new power and almost unlimited discretion to agencies. The grossly illogical result in this case, *i.e.*, equating retail stores with homes, demonstrates the profound repercussions involved in this novel and dangerous new standard, and how it could lead to agencies consistently and unilaterally thwarting the will of Congress.

2. *The decision by the court of appeals may subject homeowners to invasion of privacy and new state and local regulations*

The court of appeal's failure to utilize the "ordinary and fair" test on the USDA interpretation of "retail pet store" as mandated by prior precedent of the Supreme Court creates additional issues of exceptional importance. Not only does the panel's failure to comport with past precedent nullify many AWA goals and provisions, and significantly expand potentially illegitimate regulatory power of agencies, it also could seriously undermine the rights of hundreds of thousands of homeowners and cause significant confusion in, *inter alia*, commercial and property law.

The court of appeals itself makes a cursory reference to the potential sweeping damage this decision could cause when it notes that its view that a "home" can be defined as a "retail store" might be shared by "the local zoning authority." 315

F.3d at 298, Pet. App. at 25a. The court of appeals is only too correct in this aside. If all "homes" that sell items are seen to be legally synonymous with "retail stores"(i.e. commercial businesses) this view, as suggested by the court, might be one that would force local zoning authorities and all other regulators to enforce various health, safety, licensing and other codes and requirements on homes now suddenly viewed as "commercial establishments."

Ironically, part of the court of appeal's rationale for equating "homes" and "residences" with "retail stores" was to allow the private homes that sell pets to share in the retail store exemption from AWA requirements thereby, sparing them regulation. *Id.* at 301, Pet. App. at 31a. If it becomes precedent, however, the court of appeals opinion would have the opposite effect than that originally intended by the court of appeals. Far from sparing homeowners regulation, it could mean regulatory hardship and invasion of privacy for hundreds of thousands of individuals who sell items from their homes. The court of appeals opinion could be used to equate *anyone* who sells items retail from a private home or a retail store. This could mean that everything from a garage sale to the sale of Girl Scout cookies from a private residence could transform the residence into a commercial business. Numerous homeowners might suddenly find themselves in violation of zoning regulations, sanitary and commercial codes, licensing laws, and a variety of other laws and regulations. Due to the extraordinary legal confusion and the invasion of privacy and hardship the court of appeals opinion could cause among America's homeowners who sell items from their private homes, the Supreme Court should review the appeals court decision.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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